91-1952 (1)

NO.

Supreme Court, U.S.
FILED
MAY 28 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1991

James A. Zenni,

Petitioner,

v.

Bernard Kirsner and Joan Kirsner,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEALS
OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Do the provisions of Article V, § 3(b)(3) of the Constitution of the State of Florida, as construed by the Florida Supreme Court, which preclude Florida Supreme Court review of "per curiam affirmed" decisions of the Florida District Courts of Appeal, deny suitors equal protection of the law in contravention of the Fourteenth Amendment to the United States Constitution?

2. Do the provisions of Article V, § 3(b)(3) of the Constitution of the State of Florida, as construed by the Florida Supreme Court, which preclude Florida Supreme Court review of "per curiam affirmed" decisions of the Florida District Courts of Appeal, deny suitors due process of law in contravention of the Fourteenth Amendment to the United States Constitution?

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OPINIONS BELOW

The per curiam decision of the Fourth District Court of Appeals of the State of Florida is an unpublished opinion (infra at A-3) filed on January 22, 1992. The decision of the Fourth District Court of Appeal for the State of Florida denying rehearing of its per curiam decision of January 22, 1992 is an unpublished opinion (infra at A-4) filed on March 3, 1992. The Summary Judgment entered against petitioner by the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida is an unpublished opinion (infra at A-1) filed on April 25, 1991.

JURISDICTION

Petitioner brought the instant action, alleging breach of contract, misrepresentation, and fraud, and seeking damages from respondents, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

On April 25, 1991, the trial court entered final summary judgment against petitioner, without opinion (A-1).

Petitioner appealed the summary judgment of the trial court to the Fourth District Court of Appeal of the State of Florida.

On January 22, 1992, the Fourth District Court of Appeal of the State of Florida filed its per curiam opinion, affirming the judgment below without opinion (A-3). The District Court of Appeal denied rehearing on March 3, 1992 (A-4). Because of the construction placed on Article V, § 3(b)(3) of the Constitution

of the State of Florida by the Florida Supreme Court, further appellate review by the Florida Supreme Court was precluded due to the fact that the District Court of Appeal had affirmed the trial court without opinion. See, e.g., Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980).

The jurisdiction of this court to review the judgment of the Fourth District Court of Appeal of the State of Florida is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Meaningful appellate review of the summary judgment entered below was precluded by the construction placed on provisions of the Constitution of the State of Florida by the Florida Supreme Court, which permits a Florida District Court of Appeal to affirm a trial court judgment without opinion, so that no further review by the Florida Supreme Court is possible. Specifically, the provisions of the Florida State Constitution involved are found in Article V, § 3(b)(3) of the Florida Constitution, which provides:

> (b) Jurisdiction.--The supreme court:
>
> . . . .
>
> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another dis-

trict court of appeal or of the supreme court on the same question of law.

STATEMENT OF THE CASE

Petitioner commenced the instant action against respondents, alleging breach of contract, misrepresentation, and fraud, in connection with a contract for the purchase of corporate stock and assets of a Florida corporation. Respondents moved for summary judgment, alleging an absence of fraud and misrepresentation. Petitioner opposed the motion for summary judgment on the grounds that, inter alia, under generally accepted principles, summary judgment was inappropriate in cases of alleged fraud.

On April 25, 1991, the trial court entered final summary judgment against petitioner, without opinion. Significantly, the court made no finding that no genuine issues of material fact existed making summary judgment appropriate. Petitioner appealed the decision of the trial court to the Fourth

District Court of Appeal of the State of Florida. On appeal, petitioner urged reversal of the trial court's grant of summary judgment, on the grounds that genuine issues of material fact existed which precluded summary judgment, particularly in light of the fact that petitioner's complaint included allegations of fraud, thus making summary judgment inappropriate.

On January 22, 1992 the Fourth District Court of Appeal of the State of Florida entered its per curiam decision, affirming the trial court's grant of summary judgment. The decision of the appellate court reads, in its entirety, "affirmed." On March 3, 1992, the appellate court denied rehearing.

Further appellate review in the Florida State Court system is precluded due to the construction placed on Article V, § 3(b)(3) of the Florida State Con-

stitution by the Florida Supreme Court. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980).

This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAS DENIED ACCESS TO THE COURTS AND EQUAL PROTECTION OF THE LAW IN THE PROCEEDINGS BELOW, WHERE THE TRIAL COURT ENTERED SUMMARY JUDGMENT WITHOUT OPINION, AND THE DISTRICT COURT OF APPEAL AFFIRMED WITHOUT OPINION, THEREFORE PRECLUDING ANY MEANINGFUL APPELLATE REVIEW UNDER THE PROVISIONS OF ARTICLE V, § 3(b)(3) OF THE CONSTITUTION OF THE STATE OF FLORIDA, AS CONSTRUED BY THE FLORIDA SUPREME COURT. ACCORDINGLY, THESE PROVISIONS SHOULD BE DECLARED UNCONSTITUTIONAL, AND THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR A FULL AND FAIR HEARING FOLLOWED, IF NECESSARY, BY MEANINGFUL APPELLATE REVIEW.

This court has long recognized that the equal protection clause of the Fourteenth Amendment to the United States Constitution requires that states provide equal access to the courts. See Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

Moreover, this court has held that in requiring equal access to the courts, the equal protection clause requires equal access to established avenues of

appellate review. Id. at 310. In this regard, in Rinaldi v. Yeager, supra, this court stated as follows:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

Id.

In Lindsey v. Normet, 405 U.S. 56 (1972), this court further defined the requisites of equal access to appellate review within a state court system, under the equal protection clause, as follows:

> This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590 100 L.Ed. 891 (1956); District of Columbia v. Clawans, 300 U.S. 617, 627, 57 S.Ct. 660, 663, 81 L.Ed. 843 (1937); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 80, 50 S.Ct. 228, 230, 74 L.Ed. 710

> (1930); Reetz v. Michigan, 188 U.S. 505, 508, 23, S.Ct. 390, 392 47 L.Ed. 563 (1903); McKane v. Durston, 153 U.S. 684, 687-688, 14 S.Ct. 913, 914-915, 38 L.Ed. 867 (1894), and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Griffin v. Illinois, supra; Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); Lane v. Brown, 372 u.S. 477, 83 S.Ct. 788, 9 L.Ed.2d 892 (1963); Long v. District Court of Iowa, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 190 (1966); Gardner v. California, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). Cf. Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Ellis v. United States, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958).

Id. at 77 (emphasis added); see also Mayer v. City of Chicago, 404 U.S. 189, 193 (1971).

In the foregoing cases, this court held a state statute or rule of court to be an unconstitutional violation of the Equal Protection Clause, where the stat-

ute or rule in question unfairly limited the petitioner's ability to obtain appellate review within the state court system.

In Rinaldi v. Yeager, supra, the statute in question operated to preclude the petitioner from obtaining a trial transcript, thereby effectively negating his ability to prosecute an appeal through otherwise established avenues of appeal within the state court system.

In Lindsey v. Normet, supra, the statute in question required the petitioner to post a double bond as a prerequisite to perfecting an appeal through the state court system in a forcible entry and wrongful detainer action.

In Mayer v. City of Chicago, supra, the court rule in question precluded the petitioner from obtaining a trial transcript, thereby effectively negating his

ability to prosecute an appeal within the state court system.

In each of these cases, where the respective states had provided standard, established avenues of appellate review, this court held that the statutes and rules in question arbitrarily and capriciously precluded the petitioners in those cases from taking advantage of appellate review that, if provided, must be provided equally to all citizens.

In the present case, as in the three cases discussed above, the petitioner has been precluded, through the operation of Article V, § 3(b)(3) of the Florida Constitution, from pursuing an established avenue of appellate review that is otherwise open to litigants in the Florida state court system.

In Jenkins v. State, 385 So. 2d 1356 (Fla. 1980), and Dodi Publishing Co. v. Editorial America, S.A., 385 So. 2d 1369

(Fla. 1980), the Florida Supreme Court construed the foregoing section of the Florida Constitution to preclude discretionary review by the Florida Supreme Court of any decision of a Florida District Court of Appeal wherein the District Court of Appeal simply entered a "per curiam affirmed" decision without opinion. The Florida Supreme Court held that, whereas that court was competent to review any Florida District Court of Appeal decision upon a petition for discretionary review where the decision in question included an opinion by the District Court, the Florida Supreme Court could not even consider a petition for discretionary review in a case wherein the District Court had entered a simple "per curiam affirmed" decision.

The effect of the Florida appellate procedure discussed above is extraordinary and sweeping. Through operation

of the cited provisions of the Florida Constitution and the Florida Supreme Court's construction of the same, the District Courts of Appeal are vested with the authority to determine which of their own decisions they wish to be subjected to further appellate review. If a District Court of Appeal wishes to preclude the possibility of having its own decision reversed by the Florida Supreme Court upon discretionary review thereto, the District Court of Appeal simply enters a "per curiam" decision, thereby absolutely ensuring that the matter will be shielded from any further scrutiny.

Such appellate procedure has the obvious effect of making the District Court of Appeal the ultimate arbiter of its own decisions, in a totally arbitrary fashion. Discretionary review by the Florida Supreme Court, which is available to all suitors whose cases are decided by a Dis-

trict Court of Appeal with the benefit of a written opinion, is capriciously denied any litigants whose cases are disposed of by the District Court of Appeal in per curiam fashion. The obvious effect is to provide completely unequal, arbitrary access to discretionary review by the Florida Supreme Court, in direct contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as evidenced by the prior decisions of this court discussed hereinabove.

In the present case, the effects of the unconstitutional appellate procedure outlined above are particularly egregious to the petitioner. As noted in the Statement of the Case, supra, the trial court in this case entered summary judgment against petitioner, without opinion or explanation, in a case wherein the petitioner had alleged fraud, thereby

making summary disposition particularly inappropriate, under numerous decisions of the Florida Supreme Court.

Having thus been denied any sort of meaningful hearing nisi prius, the petitioner was then whipsawed by the District Court of Appeal, which entered a one-word affirmance of the trial court, but, like the trial court, declined to offer any explanation whatsoever for its actions. If such a result is permitted to stand, the constitutional requirement of equal access to trial and appellate courts will be rendered totally illusory within the Florida court system.

Wherefore, petitioner respectfully requests that this court declare the provisions of Article V, § 3(b)(3) of the Florida State Constitution, as heretofore construed by the Florida Supreme Court, to be an unconstitutional denial of equal protection of the laws, insofar as they

permit the Florida District Courts of Appeal arbitrarily and capriciously to limit access to discretionary review of their decisions by the Florida Supreme Court, in contravention of the requirement of equal access to the courts. Petitioner would respectfully request that this case be remanded to the Fourth District Court of Appeal of the State of Florida, with directions that that court remand this case to the trial court for trial on the merits, followed, if necessary, by meaningful appellate review.

II. THE PETITIONER WAS DENIED ACCESS TO THE COURTS AND DUE PROCESS OF LAW IN THE PROCEEDINGS BELOW, WHERE THE TRIAL COURT ENTERED SUMMARY JUDGMENT WITHOUT OPINION, AND THE DISTRICT COURT OF APPEAL AFFIRMED WITHOUT OPINION, THEREFORE PRECLUDING ANY MEANINGFUL APPELLATE REVIEW UNDER THE PROVISIONS OF ARTICLE V, § 3(b)(3) OF THE CONSTITUTION OF THE STATE OF FLORIDA, AS CONSTRUED BY THE FLORIDA SUPREME COURT. ACCORDINGLY, THESE PROVISIONS SHOULD BE DECLARED UNCONSTITUTIONAL, AND THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR A FULL AND FAIR HEARING FOLLOWED, IF NECESSARY, BY MEANINGFUL APPELLATE REVIEW.

In Boddie v. Connecticut, 401 U.S. 371 (1971), this court recognized that in addition to the Equal Protection Clause, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that state court litigants be provided reasonable and meaningful access to the courts.

In that case, the court held that in requiring all divorce suitors to pay filing fees and costs, the state statute

providing for such payments was an unconstitutional denial of due process to Connecticut women receiving state welfare assistance who were too impoverished to pay the required fees and costs. In recognizing that the due process clause requires states to provide litigants with reasonable access to the courts, this court stated as follows:

> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make timely appearance, see Windsor, supra, 93 U.S. at 278, 23 L.Ed. 914, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351, 29 S.Ct. 370, 380, 53 L.Ed. 530 (1909). What the Constitution does require is "an opportunity * * * granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added), "for [a] hearing

appropriate to the nature of the case," Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 313, 70 S.Ct. at 657. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, "within the limits of practicability," Id., 339 U.S., at 318, 70 S.Ct., at 659, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. 70 S.Ct., at 659 . . . .

Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving reli-

> gious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.
>
> No less than these rights, the right to meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals. See Mullane v. Central Hanover Bank & Trust Co., supra; Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956).

Id. at 378-79 (emphasis added; footnotes omitted).

Applying the above principles to the present case, it is clear that the course of proceedings below were designed to provide the illusion of due process, without the substance. From the record below, it is manifest that the petitioner was provided no meaningful hearing on the merits of his cause, either at the trial or appellate level. Rather, the pro-

visions of Article V, § 3(b)(3) of the Florida Constitution, as construed by the Florida Supreme Court, allowed the District Court of Appeal arbitrarily to terminate petitioner's action prior to any meaningful hearing, and to insulate the same from any further review, notwithstanding the fact that the opportunity for such further review is provided to all litigants lucky enough to receive an opinion from the District Court of Appeal, rather than a simple "per curiam affirmed" decision.

Wherefore, petitioner respectfully requests that this court declare the provisions of Article V, § 3(b)(3) of the Florida State Constitution, as heretofore construed by the Florida Supreme Court, to effect an unconstitutional denial of due process of law, insofar as they permit the Florida District Courts of Appeal to deny a petitioner any meaningful hear-

ing or appellate review in contravention of the requirement of access to the courts. Petitioner would respectfully request that this case be remanded to the Fourth District Court of Appeal of the State of Florida, with directions that that court remand this case to the trial court for trial on the merits, followed, if necessary, by meaningful appellate review.

CONCLUSION

For the foregoing reasons, the petitioner, James A. Zenni, respectfully requests that this court grant this petition and issue a Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida.

Respectfully submitted,

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Park Road
Boca Raton, Florida 33433

Counsel for Petitioner

APPENDIX A

[filed April 25, 1991]

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CL-89-1253 AG
CIVIL DIVISION

JAMES A. ZENNI,

Plaintiff,

vs.

FINAL SUMMARY JUDGMENT

BERNARD KIRSNER and
JOAN KIRSNER,

Defendants.

_____/

This action was heard on Defendants BERNARD KIRSNER'S and JOAN KIRSNER's Motion for Summary Judgment. Having heard argument of counsel and based on the Defendants' Affidavit and the matters on file subject to being considered,

IT IS ADJUDGED that Defendants' Motion for Summary Judgment is granted and that Plaintiff, JAMES A. ZENNI, take

nothing by this action and that Defendants, BERNARD KIRSNER and JOAN KIRSNER, go hence without day. This Court reserves jurisdiction to determine Defendants' further application for attorney's fees and costs.

ORDERED in West Palm Beach, Palm Beach County, Florida, on April ____, 1991.

SIGNED AND DATED
APRIL 25, 1991
JUDGE JOHN D. WESSEL

Circuit Judge

Copies provided:

Counsel of record

APPENDIX B

[NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF]

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT
JANUARY TERM 1992

JAMES A. ZENNI,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 91-1477
	)	
BERNARD KIRSNER	)	
and JOAN KIRSNER,	)	
	)	
Appellees.	)	
	)	

Decision filed January 22, 1992

Appeal from the Circuit Court
for Palm Beach County;
John D. Wessel, Judge.

Anthony F. Barone, Boca Raton,
for appellant.

Thomas J. Tighe of Lunny, Tucker,
Tighe & Lunny, Fort Lauderdale,
for appellees.

PER CURIAM.

AFFIRMED.

HERSEY, GUNTHER and FARMER, JJ., concur.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

JAMES A. ZENNI
Appellant(s),

vs.

BERNARD KIRSNER
and JOAN KIRSNER
Appellee(s).

CASE NO. 91-01477

L.T. CASE NO
CL 89-1253 AB
PALM BEACH

March 3, 1992

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed February 6, 1992, for rehearing is hereby DENIED.

This court has already issued an order January 22, 1992, granting appellee's motion for attorney's fees pursuant to Fla.R.App.P. 9.400(b). Upon remand, the trial court shall also consider attorney's fees incurred by Thomas J. Tighe, counsel for appellees, in opposing appellant's motion for rehearing.

I hereby certify the foregoing is a true copy of the original court order.

_____/s
MARILYN BEUTTENMULLER
CLERK.

cc: Anthony F. Barone
Milton T. Bauer, Clerk
Thomas J. Tighe

/CH